Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*
v.
WISCONSIN RIGHT TO LIFE, INC., *Appellee.*

SEN. JOHN MCCAIN, *et al.*, *Intervenor-Appellants,*
v.
WISCONSIN RIGHT TO LIFE, INC., *Appellee.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that actively and extensively participates in campaigns and elections and public policy debate.[1] The RNC is the national organization of the Republican Party, and exists in large part to aid in fostering political debate and the exchange of ideas among its members and the public, and in expressing, promoting, and supporting its members' political beliefs and ideals with respect to public policy issues. In doing so, the RNC is subject to and complies with all applicable laws, regulations, and rules imposed by the federal government, including federal campaign finance law. The RNC will continue to engage vigorously in campaigns, elections, and public policy debate.

SUMMARY OF ARGUMENT

1. The District Court opinion, establishing an objective test for determining whether a communication constitutes an "electioneering communication" under the Bipartisan Campaign Reform Act ("BCRA") section 203 and recognizing an exemption for genuine issue advertisements, should be affirmed. D.C. Dist. Ct. Op., (04-1260, 2006). Issue advocacy constitutes core political speech, does not constitute federal election activity under BCRA, and thus rightly falls outside of BCRA's regulatory scope. Any test other than an objective, "bright line" standard used to distinguish issue advertisements from electioneering

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

communications would unconstitutionally chill political speech in violation of the First Amendment.

2. Absent a bright line standard, any exemption to the electioneering communications regulation based upon the District Court's opinion will be subsumed, or fatally undermined, by the Federal Election Commission's ("FEC") increasingly broad, contextual, and subjective interpretation of express advocacy under 11 C.F.R. § 100.22(b). This expansive interpretation reaches far beyond the Court's First Amendment jurisprudence in this area. *See Buckley v. Valeo,* 424 U.S. 1 (1976); *Federal Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238 (1986); *see also McConnell v. Federal Election Comm'n,* 540 U.S. 93 (2003). Groups engaging in issue advocacy will risk being caught between the FEC's expanding reading of express advocacy and its narrow reading of any issue ad exemption. The result: erratic enforcement and ambiguity for the speaker, chilling political speech.

3. Simply affirming the District Court's decision unconstitutionally elevates corporate and union speech above political party speech. Unaddressed in that decision is whether the issue ad exemption the court recognized for corporations and unions extends equally, or at all, to political parties. This Court has been clear that political parties may not be consigned to second-class status in the free speech arena. This Court should expressly extend any issue ad exemption equally to political parties.

ARGUMENT

I. Issue Advocacy Should Be Exempt From Federal Campaign Finance Regulation.

The RNC agrees with the District Court that Wisconsin Right To Life, Inc.'s ("WRTL") communications do not constitute either express advocacy or its functional equivalent and that no compelling governmental interest is served by regulating genuine issue advocacy. D.C. Dist. Ct. Op., (04-1260). Further, with respect to determining what constitutes express advocacy in this context, the RNC agrees with the District Court's reasoning that an objective test must be utilized to distinguish issue ads from regulated electioneering communications – or, in the District Court's words, that the "judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker's mind," and that anything less than an objective bright line standard in the speech context is "dangerous and undesirable," *Id.* at 18-20. Indeed, bright lines *foster* political debate because they allow speakers to fully engage in debate without being forced to "hedge and trim" out of fear. *See Buckley*, 424 U.S. at 43 (internal citations omitted).

The District Court's five-factor test examining the text and images of an ad is, insofar as it goes, an approach that will assist in providing speakers engaging in issue advocacy with a safe harbor. Clear, identifiable, and predictable standards are the only constitutionally adequate means by which to regulate in the free speech context. *See Buckley*, 424 U.S. 1; *Thomas v. Collins*, 323 U.S. 516 (1945). Currently, the only sure security against the amorphous and constantly-shifting regulatory scheme for such a speaker within the electioneering timeframe is keeping quiet; the District Court's test would be an improvement. Of course, the brighter such a line is, the greater speakers' abilities are

to engage in issue advocacy without fear. The District Court's opinion is thus an encouraging step for advocates; it does not, however, go far enough.

II. The FEC's Expanding Interpretation of Express Advocacy Threatens Any Issue Ad Exemption.

The FEC regulation defining express advocacy, 11 C.F.R. § 100.22, is two part. Section 100.22(a) identifies specific campaign slogans or words "which in context can have no other reasonable meaning than to urge the election or defeat" of one or more clearly identified federal candidates. Examples of such express advocacy are "Bill McKay in '94," "support the Democratic nominee," and "vote for the President" – straightforward words and/or slogans advocating election or defeat.[2] *Id.* Section 100.22(b) defines express advocacy as any communication that

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or

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[2] Before the Court's decision in *McConnell*, 540 U.S. at 193, this was commonly referred to as the "Magic Words Test" – words that, on their face, clearly advocated the election or defeat of a federal candidate. Before BCRA's definition and restriction of electioneering communications, this test served as a constitutional bright line rule against which a communication could be measured, and served as a safe harbor for speakers conducting issue advocacy. Assuming "express advocacy and its functional equivalent" leaves room for genuine issue advocacy, it is incumbent upon this Court to tell speakers precisely when constitutionally protected issue advocacy crosses the line into "potentially corruptive" electioneering. Without such guidance, speakers are caught between risking liability for their speech and being forced to wait for a judicial or administrative approval of their speech, or both.

> defeat of one or more clearly identified candidate(s) because –
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Section 100.22(b), although broader than 100.22(a), mirrors the judicial interpretation of "functional equivalency." That is, the section is designed to capture non-"magic words" express advocacy in an objective manner. *See McConnell,* 540 U.S. at 126-27, 194 n.78. Logically, in order to pass constitutional muster, 100.22(b) could not be any more expansive than this – and thus, a finding of express advocacy under this provision should require an objective link between the words and images contained in an ad and an identified federal candidate's fitness, or lack thereof, to hold public office. *See McConnell*, 540 U.S. 93; *see also McConnell v. Federal Election Comm'n,* 251 F.Supp. 2d 176, 796 (2003). In practice, however, 100.22(b) is expanding far beyond these limits, and creating precisely the sort of subjective and ambiguous test that the District Court in this case so clearly found to fail constitutionally.

The FEC has interpreted and applied section 100.22(b) subjectively, and has made clear its intent to continue to do so.[3] Such an approach by the FEC is squarely at odds with

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[3] The FEC recently began to deploy its subjective interpretation of section 100.22(b) in enforcement proceedings. *See* League of Conservation Voters 527, MUR 5753 (2006); MoveOn.org Voter Fund,

both the District Court's holding in this litigation and this Court's own First Amendment jurisprudence. *See Buckley*, 424 U.S. 1; *Mass. Citizens for Life, Inc.*, 479 U.S. 238; D.C. Dist. Ct. Op., (04-1260). Moreover, in practical application it destroys any issue ad exemption created here. That is, any issue ad varying one iota from the text, image(s), or context of the WRTL ads will be at risk of either (1) being deemed by the FEC to contain express advocacy under 100.22(b); or (2) failing to qualify for the genuine issue ad exemption.[4] For example, there is no guarantee that an ad using the precise WRTL language and images in a state that is deemed to have a more contested campaign than existed in Wisconsin; or a state that garners more national media attention, or has media markets that cover a greater area or reach a greater number of voters than Wisconsin's; or even a state with different demographics, will not be found to either constitute express advocacy or an electioneering communication. As such, no entity can confidently conduct issue advocacy without fear of incurring an enforcement proceeding, and a finding of violation, by the FEC. Far from

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MUR 5754 (2006); Swift Boat Vets and POWs for Truth *et al*, MUR 5525 (2006). Further, in the pending *Shays v. Federal Election Comm'n*, D.C. Dist. Ct. (1:06-cv-01247) litigation, the FEC is using the "breadth of section 100.22(b)" as a defense to plaintiffs' contention in that litigation that the FEC's coordination regulations are insufficient. *See* Def.'s Mem. in Supp. of Summ. J. and In Opp'n to Pl.'s Summ. J., at 48, *Id.* This leaves speakers caught between the FEC and the courts, with the inevitable result that speech will be curtailed out of caution and fear of governmental sanction.

[4] With respect to the latter, the danger created by the District Court's five-factor examination of the WRTL ads is that rather than creating a safe harbor, the District Court's clear intent, the opinion will be applied by the FEC in reverse – as the absolute furthest reach of the issue ad exemption. In order to assure speakers that their issue advocacy will be examined on its plain face, and thus extend full constitutional protection to core speech, at a minimum this Court should expressly identify the District Court's reasoning as a safe harbor for speakers.

being able to rely on a bright line standard or safe harbor, entities wishing to engage in issue advocacy would be forced to decide whether to seek an FEC advisory opinion blessing the ad script (and visuals) before it is broadcast, or risk FEC enforcement afterward (and perhaps mounting another as-applied challenge to such a decision).

Further, an issue ad exemption places such ads, by definition, outside the scope of BCRA's "federal election activity." As such, issue ads, at least with respect to national political parties – which operate exclusively with federally regulated dollars – should be exempted from the FEC's regulations on coordinated communications. 11. C.F.R. § 109 *et seq.* Without such an exemption (and even without any discussion taking place between a political party and the candidate or officeholder identified in the issue ad) a political party may be restricted from running an exempt issue ad because it might be deemed to have coordinated the communication with a federal candidate. Absent such a ruling, the exemption created to advocate issues outside the federal electoral context may be foreclosed by regulations that are intended to apply only to the federal electoral context.

Speakers deserve a clear answer as to what constitutes federally regulated activity. The sooner such guidance exists, the sooner core speech will be extended its full constitutional protection.

III. Simply Affirming the District Court Opinion Unconstitutionally Elevates Corporate and Union Speech Above Political Party Speech.

Exempting issue ads from regulation allows corporations and unions to speak freely on the public policy issues that impact upon their organizations and memberships. Such an

exemption would certainly come as welcome news to that identified segment of the regulated community. Unaddressed, however, is whether the RNC, any other political party, or any other political organization would be allowed to avail itself of such an exemption. This Court's jurisprudence, and common sense, dictates that political parties should be included in any such exemption.

Indeed, if any issue ad exemption exists at all, it ought to apply first to political parties. The RNC, as a national political party regulated by The Federal Election Campaign Act ("FECA"), is already the subject of one of the most extensive regimes of federal regulations in America. 2 U.S.C. § 431 *et seq*. Every dollar that the RNC raises or spends is subject to FECA's source and amount restrictions, disclosed on publicly available federal reports, and compliant with FECA's rules and restrictions as to how, when, and where it may be spent.[5] No such restrictions attach to the parties that expressly benefit from the issue ad exemption under the District Court's opinion. Yet, campaign finance law first grew from concern over corporate dollars flowing into federal elections, manifesting in the Tillman Act of 1907, 34 Stat. 864 (1907). It is nonsensical to argue that there exists a compelling governmental interest in regulating national political party speech as it relates to issue advocacy where no such interest exists with respect to corporations or unions. This is only underscored by the Court's own campaign finance jurisprudence, which has always viewed restrictions on political expenditures as

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[5] The RNC's dollars, already fully regulated by federal law, are also subject to individual state law regulation where the RNC chooses to expend any funds on elections that do not include any federal candidate. For example, should the RNC participate in the upcoming 2007 Kentucky, Louisiana, or Mississippi gubernatorial races – elections in which no federal candidate will appear on the ballot – the RNC's funds will be subject to dual regulatory regimes.

deserving closer scrutiny than restrictions on contributions. *See Buckley,* 424 U.S. at 14-23; *Randall v. Sorrell,* 126 S.Ct. 2479 (2006); *Federal Election Comm'n v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431 (2001), 533 U.S. at 440-441; *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 386-388 (2000). Such scrutiny should only increase where, as here, the speech is by definition unrelated to federal election activity. This Court made clear in *Colo. Republican Fed. Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604 (1996), that a political party may not be relegated to second-class status with respect to political speech. *Id.* at 616. It simply cannot be the case that a genuine issue ad run by a corporation or union is somehow transformed into an electioneering communication merely because it is spoken by the RNC, or any other political party.

Political parties, unlike corporations and unions, exist to further their constituents' political philosophy, ideals, and goals. Participating in elections and supporting candidates is only one way by which a political party fulfills this function – but it is only one way. Promoting its members' political philosophy, and developing and evolving such philosophy through active debate and exchange of ideals are other equally important, if not more so, ways. A party's ability to attract new members and further its philosophy is fundamentally reliant on its ability to engage in issue advocacy. It is difficult to imagine President Reagan's party biting its nails over whether or not a communication denouncing communism would fall within a technical definition of electioneering. Under the FEC's ever-evolving application of BCRA, however, this is the reality.

Moreover, BCRA's absolute ban on national political party involvement with any non-federal funds whatever makes no allowance for either purely non-federal or even, as is the case here, *non-election related* activity. Issue ads that

fall wholly outside the scope of federal campaign finance regulation – ads that may be funded by unlimited amounts of corporate or union general treasury dollars – still must be paid for by federal funds if they are run by a national political party. Put simply, in the context of the speech at issue here, there is neither reason nor constitutional justification to treat national political parties differently than any other speaker.[6]

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[6] Further, outside the coordination timeframes set forth in 11 C.F.R. § 109 *et seq.*, corporations and unions may coordinate with federal candidates using such unregulated money. National political parties, however, are absolutely prohibited from any such "non-coordination coordination" due to BCRA's absolute ban on their "receiving, directing, soliciting, or spending" any non-federal dollars. This places a further limitation on political party speech relative to corporate and/or union speech that bears no conceivable relation to eradicating corruption or the appearance thereof – the only two governmental interests this Court has found to be compelling enough to draw such a line.

CONCLUSION

For the reasons set forth above, *amicus* RNC respectfully urges this Court to affirm the District Court and create an exemption for genuine issue ads from electioneering communications; to establish a bright line standard with respect to express advocacy; and expressly include political parties' in any issue ad exemption.

Respectfully submitted,

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